FILED
MAY 11 1925
WM. R. STANSBURY
CLERK

No. 1199 454

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

LEO A. PRICE, as Receiver in Equity of J. M. Gidding & Co., Inc.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York.

Supreme Court of the United States

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC., Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Notice of Application for Certiorari.

To HON. JAMES M. BECK, SOLICITOR GENERAL,
Washington, D. C.

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above named petitioner, will present the annexed petition for a writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, May 25, 1925, at the opening of court on that day or as soon thereafter as counsel can be heard, and will ask for the relief prayed for therein and for such other and further relief in the premises as may be just.

Yours respectfully,

GODFREY GOLDMARK,
Counsel for Petitioner,
No. 74 Broadway,
New York City.

Dated, May 9, 1925.

SUPREME COURT OF THE UNITED STATES.

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC., Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Leo A. Price, as Receiver in Equity of J. M. Gidding & Co., Inc., respectfully shows:

I.

Nature of proceeding and decision below.

On October 2, 1923, Charles H. Mears, a resident of Pennsylvania and a creditor of J. M. Gidding & Co., Inc., a New York Corporation, filed his bill of complaint in the United States District Court for the Southern District of New York wherein he alleged that he was a creditor of the defendant in a sum in excess of $3,000; that the defendant was unable to pay its debts as they matured; that proceedings were threatened by various crediors; that the assets were subject to waste and that if a Receiver were appointed and such assets could be liquidated in the ordinary course of defendant's busi-

ness, they might largely exceed the liabilities. The defendant thereupon admitted the allegations of the bill and the court thereupon appointed a temporary receiver who continued the business for a period and eventually a permanent receiver of the defendant was appointed. Pursuant to an order for the filing of claims, the United States of America filed its claim for additional income taxes for the year 1920, and also a claim for additional duties on importations. The Master appointed by the Court allowed the claim as a priority claim for the sum of $11,331.07, and his decision was affirmed by the District Court for the Southern District of New York and by the Circuit Court of Appeals for the Second Circuit. In the latter Court this case was argued with the case of *Liberty Mutual Life Insurance Company* vs. *Johnson Shipyards Corporation.* On April 24, 1925, the Circuit Court of Appeals handed down its opinions in the two cases in which it held that although no priority arose by virtue of R. S. 3466, nevertheless the United States of America *had a sovereign right of priority for the payment of taxes in an equity receivership.* This decision was made despite the fact that the same Court theretofore held in the case of *Equitable Trust Company* vs. *Connecticut Brass Corporation,* 290 Fed., 712, that no such sovereign right of priority existed in case of ordinary contract debts.

II.

Important reasons why this Court should allow the writ.

Your petitioner is informed that since the decision by this Court in the *Metropolitan Street Railroad* case, 208 U. S., 90, the practice has become very common throughout the country to administer the affairs of large corpo-

rations and to effect their reorganization or distribute their assets through the medium of the equity receivership, a modern substitute for a judgment creditors' bill. Numerous suits of this kind involving both railroad public utility and industrial corporations are constantly being instituted.

The status of ordinary debts due the United States in proceedings other than in bankruptcy has been considered in numerous cases in this Court ever since the enactment of the Statute of 1797 (now R. S. 3466), and recently in *U. S.* vs. *Oklahoma* 261 U. S., 253 and in *Strain* vs. *Fidelity Guarantee Co.*, 264 U. S., 570. In all these cases it has been held that the Federal Government did not take over the sovereign right of priority of the Crown of England, but that the priority of this government for the payment of ordinary indebtedness was wholly dependent on Statutes passed by Congress in the exercise of its delegated powers. It was further held in this long line of cases that unless a debtor was divested of his property in one of the methods specified in R. S. 3466 or the earlier Act of 1797 no priority existed.

This Court, however, has never considered the grave question here presented; namely, *whether in the absence of Statute creating a priority for taxes due the United States in proceedings other than bankruptcy, the United States, a government of delegated powers (as distinguished from a sovereign State) has inherited the prerogative right of priority of the Crown of England.*

Stated in another way the question is whether a sovereign right of priority for Federal taxes exists as against other creditors of a corporation where the corporate assets are distributed in a judgment creditors suit in which the debtor has not been divested of its property as provided in R. S. 3466, and where there is no prior lien for taxes because of failure to comply with the provisions of R. S. 3186.

Your petitioner is informed that in many cases of this character—an equity receivership—very large claims of the United States for taxes are being presented, such claims in most instances arising from an audit of the books of the corporation following the appointment of the Receiver. In no case, other than the case at bar and its companion case of *Liberty Mutual Life Insurance Company* vs. *Johnson Shipyards Corporation,* has the status of such tax claims been considered.

Your petitioner admits that Congress has the power to create a priority for such tax claims but your petitioner asserts that no such priorty in fact has been created where a debtor is divested of its property by judgment creditor's suit.

To the end that the status of Federal tax claims in equity receiverships may be definitely determined, both for the guidance of Receivers throughout the country and for Government officials, your petitioner asks for the granting of a writ herein.

WHEREFORE, because of the gravity and importance of the question presented, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, requiring them to certify and send to this Court a transcript of the record of the proceedings in this case, to the end that the decree of said Court may be reviewed, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

LEO A. PRICE,
As Receiver in Equity of
J. M. Gidding & Co., Inc.

STATE OF NEW YORK, }
County of New York, } ss.:

LEO A. PRICE, being duly sworn, deposes and says as follows:

I am the Receiver in Equity of J. M. Gidding & Co., Inc. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

LEO A. PRICE.

Sworn to before me this
8th day of May, 1925.

JOHN E. McGUIRK,
Notary Public, Bronx Co.
Certificate filed N. Y. Co.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GODFREY GOLDMARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC.,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Question Presented.

The question presented is whether the United States of America is entitled to priority in the payment of its claim for taxes in a creditors' suit brought for the purposes of conserving, marshalling and distributing the assets of a corporation in which it is conceded that the debtor has not been divested of its property in one of the methods specified in R. S. 3466 and where there is no lien under R. S. 3186. The petitioner does not question the right of Congress to create such a priority in the exercise of its delegated powers. The petitioner's claim is that the right of priority is wholly statutory and that Congress has not in fact exercised its delegated powers under the facts of this case and accordingly that the award of priority by the Court was, in fact, nothing more than judicial legislation.

Applicable Statutes.

The only statutes which have application are the following:

R. S. 3466.

Section 3466 of the Revised Statutes (Compiled Statutes, Sec. 6372), provides as follows:

> "Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

R. S. 3186.

Section 3186 of the Revised Statutes as amended in 1913 (Compiled Stat., Section 5908), provides as follows:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person; *Provided, however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor* until notice of such lien shall be filed by the collector in the office of the clerk of the District Court of the District within which the property subject to such lien is situated; Provided, further, whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the Counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that State as against any mortgagee, pur-

chaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

Brief of the Argument.

I.

Sovereign priority in England under the common law was based on the principle that when the rights of the Crown and the rights of a subject against a common debtor were concurrent, the rights of the Crown prevailed, whether the Crown's claim was for taxes or for other form of indebtedness.

Marshall vs. *N. Y.*, 254 U. S., 380;
Matter of Henley, 9 Ch. Div., 467;
Commissioners of Taxation for New South Wales vs. *Palmer*, 1907, Appeal cases 179.

II.

By an unbroken line of decisions for over a century, it has been held that the foregoing principle is not applicable in this country when the rights of the United States and a private citizen against a common debtor are concurrent. Under such circumstances, the rights of priority of the United States are those, and only those, created by Congress in the exercise of its delegated powers.

U. S. vs. *Oklahoma*, 261 U. S., 253;
U. S. vs. *Fisher*, 2 Cranch 358, 395;
U. S. vs. *Bank of North Carolina*, 6 Peters 29, 35;

U. S. vs. *Canal Bank*, 3 Story 79 (Federal case 14,715).

III.

The distinction between the nature of an obligation *ex contractu* and the obligation to pay a tax is immaterial to the question presented in the light of the basis of sovereign priority and the relationship between the State and the Federal Governments. As the priority of the Federal Government for a debt depends upon the exercise of a delegated power, so the priority for a tax must also depend upon the exercise of such delegated power.

IV.

If the dictum in the *Dollar Savings Bank* case, 19 Wallace, that so much of the royal prerogative as belongs to the king in his capacity as universal trustee enters as much into our political state as it does into the principles of the British Constitution, is the law, then the United States must now be held to have a sovereign prioriy for ordinary debts despite a century of decisions to the contrary.

U. S. vs. *Fisher*, 2 Cranch, 358, 395.

V.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and as the provisions of R. S. 3186 were not complied with in this case prior to receivership, the tax claim is entitled to no priority over general creditors.

Pusey-Jones Co. vs. *Hanssen*, 261 U. S., 491;
Metropolitan Street Railway Cases, 208, U. S., 90;
Marshall vs. *New York*, 254 U. S., 380;
Am. & British Securities Co. vs. *Am. & British Mfg. Co.*, 275, Fed., 121.

VI.

If a tax claim is a debt within the meaning of R. S. 3466 then the government is not entitled to priority because the debtor has not been divested of its property in one of the methods specified in that section.

Beaston vs. *Farmer's Bank*, 12 Peters 102, 136;
U. S. vs. *Oklahoma*, 261 U. S., 253;
Equitable Trust Co. vs. *Connecticut Brass Corporation*, 290, Fed., 712.

Argument.

POINT I.

Sovereign priority in England under the common law was based on the principle that when the rights of the crown and the rights of a subject against a common debtor were concurrent, the rights of the crown prevailed, whether the crown's claim was for taxes or for other form of indebtedness.

The prerogative of the crown of England had its origin in the common law maxim:

Quando jus domini regis et subditi concurrant, jus regis praeferri debet.

This principle was applied, as the authorities hereafter cited will show, in the cases of taxes, debts due by record, debts upon a specialty and ordinary debts. The only difference recognized in these classes of claims was one based upon the circumstances in which the priority attached, that is, the rights of the crown and a subject against a common debtor, had to be concurrent. If the creditor subject had a lien before the crown moved, then the claim of the subject prevailed.

A very good statement of the English procedure is found in *Middlesex Co.* vs. *State Bank,* 29 N. J., Eq., 268 (aff'd on opinion below, 30 N. J. Eq., 311) where the Vice-Chancellor said:

> "Anciently the king might, by his writ of protection, prevent any subject from suing his debtor until his debt was paid. By statute 25 Edw. III., ch. 19, its despotic rigor was so far mitigated as to allow the subject to obtain a judgment against the king's debtor, and, upon paying the king's debt, to have execution for both debts. But the prerogative has at all times been most loyally upheld by the English courts. It stands on a common law maxim: *Quando jus domini regis et subditi concurrant, jus regis praeferri debet.* Debts due the crown by record or upon specialty are entitled to preference over debts of the same class due to subjects, but simple contract debts due to the crown are not entitled to preference over debts of record due to subjects (Com. Dig., Title Administrator, ch. 2; Bac. Abr., title Execution, L 2; 2 Wms. on Ex'rs 991); but where both are simple contract debts that due to the crown must be preferred (Bac. Abr., title Executors L 2; 2 Wms. on Ex'rs 993).

The same historical facts may be found in the following cases:

State of Maryland vs. *The Bank*, 6 Gill & J., 205;

Matter of Devlin, 180 Fed., 170, 174, and cases cited.

American and English cases showing that prerogative right for debts and taxes was the same.

The authorities in England and here also indicate that the right to a priority in payment of a tax is bottomed upon precisely the same foundation. In fact, the only question seems to have been whether the prerogative right which existed with respect to taxes extended to ordinary debts.

In *Marshall* vs. *New York*, 254 U. S., 380, the question was as to the priority of the *State* with respect to its *claim for taxes*. This court showed that a State's priority for taxes emanated from the crown's priority for all *debts*. Justice Brandeis said at p. 382:

> "At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles* vs. *Grover*, 9 Bing., 128, 139, 157, 183; in *re Henley & Co.*, 9 Ch. D. 469, compare *United States* vs. *National Surety Co.*, decided by this court November 8, 1920, ante, 73."

In *Matter of Carnegie Trust Co.*, 206 N. Y., 390, at 397, the Court of Appeals in discussing a *State's* priority, said:

> "The king, therefore, and the prerogatives that

> were personal to him being repugnant to our Constitution are abrogated. But his sovereignty, powers, functions and duties, in so far as they pertain to civil government, now devolve upon the people of the state and consequently are not in conflict with any of the provisions of our Constitution. In as much, therefore, as the claims or moneys due the king, for the support and maintenance of the government, *whether derived from taxes or other sources of income,* were preferred over the claims of others, it follows that under the first sub-division of the provision of the Constitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution."

And in England the claim of priority for taxes also emanates from the same source.

In *Matter of Henley,* 9 Ch. Div., 467 (1878) a motion was made by Her Majesty's Commissioners for Inlands Revenue for a direction to the official liquidator of Henley & Co. to pay out of the assets of the company £56.5s in satisfaction of property and income *taxes* due from the corporation in respect of certain lands—the payment to be made in priority to the other claims against the company. The company was being wound up voluntarily by resolution and the winding up had been continued under the supervision of the court. The court held that the crown was not bound by the Winding Up Act and therefore could have issued its writ of extent, but it held further that this was not necessary and that the claim could be made by the Liquidator because of the crown's prerogative right to be preferred when its claim concurred with that of other creditors. Several opinions were written. BRETT, L. J., said:

> "There are two prerogatives of the crown bearing upon this question. The first is that the crown is not bound by a statute in which it is not specially mentioned. Therefore the crown is not bound by the Companies Act. It follows that **this**

being clearly a debt for which the crown can distrain, its power of distress is not taken away by the Act, and it can proceed to distrain in this case. It is, therefore, right that the **debt** should be paid in priority to the other creditors.

"But suppose we regard it merely as a simple contract debt; then in the administration of the assets of the company the crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects, the right of the crown must prevail. Therefore in whichever way we look at the question, I think the crown ought to be paid this debt in priority."

And finally in *Commissioners of Taxation for the State of New South Wales* vs. *Palmer,* 1907, Appeal Cases 179, the question was whether in the administration of the assets of a bankrupt under the New South Wales Bankruptcy Act, the court should have allowed the claim of the crown for inland and income *taxes* as a preferential claim. The court below held that as the Bankruptcy Act gave no such priority, the claim was not preferred. The Privy Council of the House of Lords, however, reversed this decision, following the decision in the *Matter of Henley* above referred to, and held that from earliest times the King's debts were to be preferred when his title and that of his subjects concurred. The court said:

"In *Rex* vs. *Wells,* in a passage which has been often cited, MACDONALD, C. B., says: 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred.' Except so far the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonably, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by LORD COKE in *Quick's*

> case. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.
>
> * * * * *

From the foregoing authorities it is submitted that it is entirely clear that any right for the prior payment of taxes has always been held to rest upon precisely the same principle as any prior right to the payment of ordinary debts, namely where the rights of Crown and subject concur the rights of the Crown prevail. It is also clear that in England a tax is deemed to be a debt in so far as the right of priority is involved.

POINT II.

By an unbroken line of decisions for over a century, it has been held that the foregoing principle is not applicable in this country when the rights of the United States and a private citizen against a common debtor are concurrent. Under such circumstances, the rights of priority of the United States are those, and only those, created by Congress in the exercise of its delegated powers.

The Constitution, Article 1, Section 8, provides as follows:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties,

imposts and excises shall be uniform throughout the United States."

And Clause 18 of the same article and section provides as follows:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

In *U. S.* vs. *Fisher,* 2 Cranch, 358,395, it was held that the power to create a priority for ordinary debts was a delegated power of the Federal Government, exercised in pursuance of the foregoing Clause 18. Chief Justice MARSHALL said:

> "If the act has attempted to give the United States a preference in the case before the court, it remains to inquire, whether the constitution obstructs its operation. To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department, when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument. In the case at bar, the preference claimed by the United States is not prohibited; *but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.* It is claimed, under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States or in any department or officer thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various sys-

> tems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object."

In *United States* vs. *Canal Bank*, 3 Story, 79 (Fed. case No. 14,715), Judge STORY, sitting in the Circuit Court, said:

> "It has long since been settled, by the solemn adjudications of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some statute, passed by Congress, in virtue of its constitutional authority. This was expressly so held in *U. S.* vs. *Fisher*, 2 Cranch (6 U. S.), 358, 396, and the doctrine has ever since been strictly adhered to. *U. S.* vs. *Hooe*, 3 Cranch (7 U. S.), 73; *Prince* vs. *Bartlett*, 8 Cranch (12 U. S.), 431; *Thelleson* vs. *Smith*, 2 Wheat (15 U. S.), 396; *U. S.* vs. *Howland*, 4 Wheat (17 U. S.), 108; *Conrad* vs. *Atlantic Inc. Co.*, 1 Pet. (26 U. S.), 387. It is not here, as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown. Com. Dig. 'Prerogative,' D. 86; id. 'Debt,' G. 8, G. 9."

The most recent enunciation of the foregoing principles is found in

U. S. vs. *Oklahoma*, 261 U. S., 253.

It is apparent therefore that unless the conceded distinction between a debt *ex contractu* and a tax obligation is the basis for the absence of a sovereign right of priority in one case and its presence in the other no right of priority exists.

POINT III.

The distinction between the nature of an obligation ex contractu and the obligation to pay a tax is immaterial to the question presented in the light of the basis of sovereign priority and the relationship between the State and the Federal Governments. As the priority of the Federal Government for a debt depends upon the exercise of a delegated power so the priority for a tax must also depend upon the exercise of such delegated power.

It is, of course, frankly conceded the nature of an obligation arising *ex contractu* is different from that arising for the payment of a tax. But this distinction while important for many purposes is not deemed important or decisive of the question presented here.

As has just been shown, the priority for taxes and debts in England rested on the same principle. As it has been held in an unbroken line of authority that the Federal Government did not inherit the prerogative of the crown and that the priority of the Federal Government is wholly dependent upon statutes passed by Congress in the exercise of its delegated powers it must follow that the *nature* of the indebtedness to the United States cannot of itself give rise to a sovereign priority. *Whether Con-*

gress creates a priority to make effective its express power to provide for the payment of debts of the Union, or to make effective its express power to lay and collect taxes, is immaterial. In either case, the priority is a creation of statute passed in pursuance of the power vested in Congress under Clause 18, *supra,* namely, the power to make all laws necessary and proper for carrying into execution the express powers vested in Congress by the Constitution.

POINT IV.

If the dictum in the Dollar Savings Bank case, 19 Wallace, 227, 239, that so much of the royal prerogative as belongs to the King in his capacity as universal trustee enters as much into our political state as it does into the principles of the British Constitution, is the law then the United States must now be held to have a sovereign priority for ordinary debts despite a century of decisions to the contrary.

In the *Equitable Trust* case, 290 Fed., 712, 717, involving priority for contract debts this dictum was urged upon the Court by the government. Judge ROGERS, speaking for the Circuit Court of Appeals, after quoting the dictum, said:

> "But that case did not involve the question now under consideration, and has never been understood, notwithstanding the generality of the language used, as intended to assert that the United States possesses a right at common law to priority of payment over other creditors. In that case the court was construing a statute which created a right and provided a particular remedy for its

> enforcement. All that was decided was that such a statute, by impliedly prohibiting other remedies than the one it gave, did not bind the government; it is not being named therein."

Nevertheless, in the present case, in its essence, the decision below is based upon this very dictum. If the Federal Government has inherited the prerogative of the King for the prior payment of taxes, there is nothing in our political system or in the Constitution which would not inevitably lead to the conclusion that the Federal Government also inherited the prerogative for the payment of debts, and yet, the decision in *United States* vs. *Fisher,* 2 Cranch, 358,395, is just to the contrary and the reasoning of that case has been followed ever since and as late as the decision in *United States* vs. *Oklahoma.*

If the United States has a sovereign priority for the payment of debts, then all the decisions for a period of 100 years have erroneously denied the United States its priority under varying circumstances.

The power of Congress to *create* a priority for taxes under all circumstances is not denied. The claim is that no such priority has been created where a debtor is divested of its property as the result of a creditor's suit, such as the one at bar.

POINT V.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and as the provisions of R. S. 3186 were not complied with in this case prior to the receivership, the tax claim is entitled to no priority over general creditors.

The present suit is a creditor's bill where the defendant

has waived the necessity of the obtaining of a judgment. Such a waiver is, however, merely procedural. The purposes of the suit are just the same as if there were a judgment:

Pusey & Jones Co. vs. *Hanssen*, 261 U. S., 491;
Metropolitan Street Railway cases, 208 U. S., 90.

Section 3186 of the Revised Statute, quoted at length above, provides that if a tax is not paid after demand, the amount shall become a lien from the time that the assessment list is received by the Collector, except that such lien shall not be valid as against mortgagees, purchasers and *judgment creditors*, until the lien is filed in the office of the District Court or in some state office designated by a state legislature.

In the present case the tax was not assessed until after the receiver was appointed and the property of the defendant had passed into the custody of the court. At the time of the filing of the bill, there was no lien. However, if the contention of the Government is sound, it must be held that if Mears, the plaintiff in this case, had obtained a judgment, had execution returned unsatisfied and had brought a judgment creditor's bill, the Government would have a priority over Mears' judgment, despite the fact that the provisions of 3186 had not been complied with. If it be true that the United States has such a priority, then the provisions of 3186 insofar as they protect the rights of judgment creditors, are wholly meaningless.

If numerous other creditors of the defendant corporation had instituted suits, obtained judgments and eventually brought judgment creditors' suits, their right of satisfying such judgment out of the assets of the defendant would have been superior to that of the Government, because of the latter's failure to comply with Section

3186. The fact that the suit was instituted by one creditor, Mears, on behalf of all, and the fact that a judgment was waived and the other creditors enjoined from proceeding to judgment, cannot increase the rights of the United States.

> See *American & British Securities Co.* vs. *American & British Manufacturing Co.*, 275 Fed., 121.

As appears from *Marshall* vs. *N. Y.*, 254 U. S., 380, at common law the priority of the Crown overreached an execution. The very purpose of R. S. 3186 as amended in 1913 was to change this rule and protect judgment creditors from unrecorded taxes.

POINT VI.

If a tax claim is a debt within the meaning of R. S. 3466, then the Government is not entitled to priority because the debtor has not been divested of its property in one of the methods specified in that section.

It is believed that the term "debts" as used in the Act of 1797, now R. S. 3466, was intended to include all forms of indebtedness which might be due to the United States, for as stated by this court in *United States* vs. *Chamberlain*, 219 U. S., 250, 262:

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used."

If this conclusion is correct, then there is no priority,

because the debtor has not been divested of his property in the manner prescribed in that Section.

Beaston vs. *Farmers Bank*, 12 Peters, 102, 136;
U. S. vs. *Oklahoma*, 261 U. S., 253;
Strain vs. *U. S. Fidelity & Guarantee Co.*, 292 Fed., 294; aff'd 264 U. S., 570;
Equitable Trust Co. vs. *Connecticut Brass Corp.*, 290 Fed., 712.

Even if a tax is not a debt within the meaning of that section so that there is no priority for taxes where a debtor is not divested of its property in one of the methods there specified, nevertheless as said by Justice Brandeis in *Ebert* vs. *Poston*, 69 L. Ed., 215, 217:

> "A *casus omissus* does not justify judicial legislation."

If Congress believes that the administrative provisions of the taxing statute or the priority statutes should be amended, that is a legislative and not a judicial question.

POINT VII.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GODFREY GOLDMARK,
Counsel for Petitioner.

APPENDIX.

Opinions in Liberty Mutual Insurance Company Case upon the authority of which the decree below in this case was based.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,
against
JOHNSON SHIPYARDS CORPORATION,
Defendant.

FRANK E. STRIPE and MAURICE P. DAVIDSON, as Receivers in Equity of Johnson Shipyards Corporation,
Appellants,
against
UNITED STATES OF AMERICA,
Appellee.

Before ROGERS, MANTON and HAND,
Circuit Judges.

ROTHWELL, HARPER & MATTHEWS,
For Appellants.

HAROLD HARPER,
Of Counsel.

WM. HAYWARD, United States Attorney for the Southern District of New York, for Appellee.

THOMAS J. CRAWFORD, Assistant U. S. Attorney.

JOHN HOLLEY CLARK, JR., Assistant U. S. Attorney,
Of Counsel.

These causes come here from the United States District Court for the Southern District of New York.

This action was begun as an ordinary conservation suit in equity and receivers of the defendant were appointed therein.

The United States filed claim with the receivers for income and excess profits taxes for the years 1917 to 1920, and also claimed to be entitled to priority of payment thereon.

The matter was referred to a Special Master, who reported that the defendant was indebted to the United States in the sum of $3,931.99 for taxes but denied that the United States was entitled to a priority in the payment thereof over general creditors.

No exceptions were taken to his report so far as the amount of the claim was concerned. But exceptions were taken to his denial of the right of the United States to priority of payment out of the assets of the estate.

The District Judge sustained the exceptions taken to the report, and awarded to the United States priority of payment in an order entered on August 4, 1924.

An appeal to this court was thereupon taken.

ROGERS, Circuit Judge.

The only question which this case raises is whether the United States, in an equity receivership suit, is entitled to priority of payment over the unsecured claims of general creditors, for its claim to income and excess profits taxes. In the court below the right of the United States to such priority, under the circumstances stated, was sustained.

The appellants in bringing the case into this court contend that the claim of the United States for taxes is merely a general claim against the estate, and that the United States is entitled only to share pro rata with the general creditors in obtaining the payment of a claim for taxes.

The Bankruptcy Act, sec. 64, providing for the settlement of estates in bankruptcy directs that there shall

first be paid "All taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors." But that Statute has no application to the facts of this case, which is not a proceeding in the bankruptcy courts for the settlement of a bankrupt's estate.

And Section 3466 of the Revised Statutes provides as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This Section does not apply unless it appears that the debtor's property is insufficient to pay all his debts. *United States* vs. *State of Oklahoma*, 261 U. S., 253, 259, and unless in addition particular acts, required by the Section as evidencing such insolvency are shown. *Strain* vs. *United States Fidelity & Guaranty Co.*, 292 Fed., 694, aff'd by United States Supreme Court, 66 L. Ed., 387.

But Section 3466 relates only to the payment of "debts" and as we shall see taxes are not debts. Moreover we are not now dealing with an insolvent debtor, nor the estate of a deceased debtor, nor of a debtor who has made a voluntary assignment nor the estate of an absconding, concealed or absent debtor. So that Section 3466 clearly has no application to the pending case.

It is said that the question involved is controlled by the decision of this court in *Equitable Trust Company*

vs. *Connecticut Brass & Manufacturing Corporation*, 290 Fed., 712. The Government in that case had intervened in an equity suit similar in character to this one and asserted a claim approximately for $350,000 damages for conversion of copper supplied to the defendant under a contract for the manufacture of war munitions and also claimed priority of payment out of the assets in the hands of the receivers. The claim for priority was based on the provisions of Section 3466 of the Revised Statutes. This court denied the right to the priority on the ground that the right of the United States to priority in the payment of debts was statutory, and that Section 3466, which provided for the priority of payment of Government debts under prescribed conditions, had no application to the case of the distribution of the assets of an equity receivership. The court said:

> "We think the decisions of the Supreme Court, extending over a period of more than 100 years, have clearly established the law that the right of the United States to priority of payment is statutory, and does not apply while the debtor continues the owner of the property, even though he is unable to pay his debts. No evidence can be received of the insolvency of a living debtor until he has been divested of his property by making a voluntary assignment or has committed an act of bankruptcy, or his effects have been attached by process of law on the ground that he is an absconding, concealed, or absent debtor."

In that case we were dealing with the right of the United States to a priority in the payment of a debt due to it. We thought that whatever right to a priority the United States possessed, respecting the payment of debts, was statutory and did not exist independently of Statute. The subject has been regulated by Statute, so far as the Government of the United States is concerned, from the days of the First Congress to the present.

That the right of the United States to priority in the

payment of debts depends exclusively upon Statute seems to be established law from several decisions to which we shall briefly refer.

In *United States* vs. *Oklahoma,* 261 U. S., 253, 259, the court stated:

> "The claim of the United States to the asserted priority rests exclusively upon the statute."

In *United States* vs. *Fisher,* 2 Cranch, 358, 395, the court, speaking through Chief Justice MARSHALL in 1805, said:

> "In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."

In that case the court held that in all cases of insolvency or bankruptcy of a debtor of the United States the Government was entiled to priority of payment. The question did not relate to the collection of a tax but to the right of the United States as the holder of a protested bill of exchange to a preference over general creditors where the debtor became a bankrupt. The right to priority of payment was rested upon an Act of Congress and not upon any doctrine of sovereignty.

In *United States* vs. *Bank of North Carolina,* 6 Peters, 29, 34, Mr. Justice STORY in 1832, writing for the court, said:

> "The right of priority of payment of debts due to the government is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not

> stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

In *United States* vs. *Canal Bank*, 25 Fed. Cas., p. 277, 278, 3 Story, 79 Mr. Justice STORY, sitting in the Circuit Court in 1844, and after calling attention to the fact that several questions were involved, said:

> "In the first place, whether the United States have any priority, or privilege, in respect to the debts due to them by their debtors, over the debts due to private persons, so as to entitle them to a prior satisfaction, upon any judgments obtained against their debtors, out of the property attached, before other attaching creditors, whose attachments are of an earlier date. It has long since been settled, by the solemn adjudications of the Supreme Court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some Statute, passed by Congress, in virtue of its constitutional authority. This was expressly so held in *United States* vs. *Fisher*, 2 Cranch (6 U. S.), 358, 396, and the doctrine has ever since been strictly adhered to. *United States* vs. *Hooe*, 3 Cranch (7 U. S.), 73; *Prince* vs. *Bartlett*, 8 Cranch (12 U. S.), 431; *Thelleson* vs. *Smith*, 2 Wheat (15 U. S.), 396; *United States* vs. *Howland*, 4 Wheat (17 U. S.), 108; *Conrad* vs. *Atlantic Ins. Co.*, 1 Pet. (26 U. S.), 387. It is not here, as it is in England, where the

> sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown, Com Dig. 'Prerogative,' D. 86; id. 'Debt,' G. 8, G. 9."

It is quite another question whether the United States is entitled to priority in enforcing the payment of a claim for taxes. If any such priority exists it plainly does not rest upon Statute for there is no legislation by Congress upon that subject and never has been any, except to create a lien, as hereinafter appears.

Before we proceed further with a consideration of the question presented it may be well to point out that a fundamental distinction exists between debts and taxes. They are two very distinct matters. A debt is not a tax and a tax is not a debt. Debts are due to the Government in its corporate capacity. Taxes are due to it in its sovereign capacity. A debt is a sum of money due upon contract, express or implied, or one which is evidenced by a judgment. Taxes are imposts levied by government for its support or for some special purpose which the government has recognized. *Meriwether* vs. *Garrett*, 102 U. S., 513, 514; *Lane County* vs. *Oregon*, 7 Wall., 71, 79.

In *Pierce* vs. *City of Boston*, 3 Met., 520, a Statute of Massachusetts allowed mutual debts to be set off and the defendant attempted to set off against a demand of the plaintiff certain taxes due to the city. The court did not regard taxes as debts.

In *City of Camden* vs. *Cullen*, 26 N. J. L., 398, the court said:

> "A tax, in its essential characteristics, is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It orig

> inates in and is founded upon contract express or implied."

And see to the same effect *United States* vs. *Eggleston,* 4 Sawy., 199, 25 Fed, Cas. No. 15, 027; *Crabtree* vs. *Madden* 54 Fed., 426; *United States* vs. *McHatton,* 266 Fed., 602; *People* vs. *Dummer,* 274 Ill., 637, 643.

In *McCulloch* vs. *State of Maryland,* 4 Wheat., 316, 428, Chief Justice MARSHALL pointed out that the power to tax is essential to the very existence of government. "It is obvious," he said, "that it is an incident of sovereignty, and is co-extensive with that to which it is an incident."

In *United States* vs. *Bennett,* 232 U. S., 299, 306, Chief Justice WHITE, alluding to the limitations upon the power of the States to tax, says that they afford no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States "for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

And in the recent case of *Cook* vs. *Tait,* 265 U. S., 47, 56, the court quotes approvingly the statement made by Chief Justice WHITE in the case of *United States* vs. *Bennett, supra.*

In *Cooley on Taxation* (4th ed. vol. 1, sec., 57) that eminent authority said:

> "The power of taxation is an essential and an inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the Government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the government requires contributions from them* * *. Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the Government, but instead merely constitute limitations upon a power

which would otherwise be practically without limit."

In Blackstone's Commentaries (Lewis's ed.), vol 3, page 160, note 37, it is said:

> "The authorities are overwhelmingly in favor of the conclusion, that taxes are not debts in the sense that they are liabilities arising out of contracts express or implied, and in the true sense are not debts at all, but are the enforced proportional contribution of each citizen and of his estate, levied by authority of the State, for all public needs; that they owe their existence to the action of the legislative power, and do not depend for their validity and enforcement upon the individual assent of the taxpayer, but operate in invitum."

Congress by the Act of July 13, 1866, ch. 184, Sec. 9, page 147, declared that "if any person * * * liable to pay a tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid * * *."

The Act of March 4, 1913, c. 166, 37 St.Pt.I, p. 1016, makes the lien run from the time when the assessment list is received by the Collector. And the Statute provides that the lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice of such lien shall be filed by the collector in the office of the district court of the district within which the property subject to such lien is situated.

It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims. And it is

thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See *State of Minnesota* vs. *Central Trust Company,* 94 Fed., 244, 247, 248, and cases there cited.

The courts have sustained in numerous cases the right to priority of payment of taxes over all other claims. *State of Minnesota* vs. *Central Trust Co. of N. Y., supra, Burleigh* vs. *Chehalis County,* 75 Fed., 873; *George* vs. *St. Louis Cable & Western Ry Co.,* 44 Fed. 117; *Coy* vs. *Title Guarantee & Trust Co.,* 220 Fed. 90; *Davis* vs. *Pullen,* 277 Fed. 650; *Greeley* vs. *Provident Savings Bank,* 98 Mo. 458; *State* vs. *Rowse,* 49 Mo. 586; *Jack* vs. *Weiennett,* 115 Ill. 105; *State* vs. *Harris,* 17 So. Car. L. (2 Bailey) 598; *Butley* vs. *Bailey,* 2 Bay (S. C.) 244, 249. But these cases relate to the right of a State to priority of payment of a State tax, which is to be distinguished from the right of the United States to a similar priority, possibly in the fact that the States have a common law while it has often been said by the Supreme Court that the United States has no common law.

However, instances are numerous in which the common law prerogatives of the sovereign have been held applicable to the United States in its sovereign capacity. To a few of these we shall refer.

The prerogative of the Crown of England had its origin in a maxim of the common law:

> Quando jus domini regis et subditi concurrant,
> jus regis praeferri debet.

No suit or action could be brought against the King even in a civil action. 1 Blackstone's Com. 242. The same principle exists as respects the bringing of actions against the United States where no Act of Congress has provided otherwise.

In *United States* vs. *Clarke,* 8 Peters, 436, 444, Chief Justice MARSHALL in 1834 said:

> "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

And in *The Siren*, 7 Wall., 152, 154, the Supreme Court said in 1868:

> "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."

It is an ancient maxim of the common law *Nullum tempus occurrit regis*. It is a part of the prerogative of the sovereign. And Blackstone states that it is the standing maxim upon all occasions. 1 Commentaries 247. The same principle is applicable to the United States. The question was before the Supreme Court in *United States* vs. *Nashville, Chattanooga &c. Railway Company*, 118 U. S., 120, 125, where Mr. Justice GRAY said:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or

> agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. *Lindsey* vs. *Miller,* 6 Pet. 666; *United States* vs. *Knight,* 14 Pet. 301, 315; *Gibson* vs. *Chouteau,* 13 Wall, 92; *United States* vs. *Thompson,* 98 U. S., 486; *Fink* vs. *O'Neil,* 106 U. S., 272, 281."

A legislative act did not bind the King unless he was expressly named therein. Vol. 1, Blackstone's Com., p. 262.

In *Dollar Savings Bank* vs. *United States,* 19 Wallace, 227, 239, the Supreme Court said:

> "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

The King (and any person suing to his use) shall neither pay nor receive costs. 3 Blackstone Commentaries 400. The privilege that he was not to pay costs was a part of his prerogative. In *United States* vs. *Hooe,* 3 Cranch 73, 92, the Supreme Court held in 1805 that costs could not be charged against the United States. And in 1817 in *United States* vs. *Barker,* 2 Wheat., 395,

rendered the decision of the Supreme Court the whole of which follows: "The United States never pay costs." And see *The Antelope,* 12 Wheat. 546; *United States* vs. *Ringgold,* 8 Peters, 150; *United States* vs. *Boyd,* 5 How., 29.

The principles laid down in the above cases are readily understood if the doctrine announced in *Dollar Savings Bank* vs. *United States, supra,* hereinbefore quoted is adhered to, viz., that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae* is as much a part of the national government as it is a part of the British constitution. Applying that principle to the facts herein involved we must sustain the right of the United States to priority of payment of the taxes.

The King and the prerogatives personal to him, being repugnant to the Constitution, are no doubt abrogated. However, the prerogatives he possessed in so far as they pertain to civil government and so far as they are not in conflict with the provisions of the Constitution survive and may be asserted by the United States. See *Matter of Carnegie Trust Co.,* 206 N. Y., 390, 397.

As this Court said in *Matter of Finkelstein,* 298 Fed., 11, 16, there is no doubt that the right of priority of the United States in the collection of taxes is an attribute of sovereignty.

We are of opinion that the United States, as a sovereign nation, is clothed with all the attributes of sovereignty except in so far as it is deprived of them by restrictions expresed in or which arise from the Constitution. And we think that independently of any specific statutory provision the United States in its capacity as a sovereign is entitled to a priority in the payment of taxes over unsecured creditors, such priority being possessed by it as a prerogative right. The United States being a Nation, its sovereignty extends to all persons within its boundaries and to the property of such persons even though such property is in the hands of an equity receivership.

Order Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,

against

JOHNSON SHIPYARDS CORPORATION,
Defendant.

FRANK E. STRIPE and MAURICE P. DAVIDSON, as receivers in equity of Johnson Shipyards Corporation,
Appellants,

against

UNITED STATES OF AMERICA,
Appellee.

Concurring Opinion of Hand, C. J.

HAND, Circuit Judge, (concurring): I agree with Judge Rogers' opinion except in one particular. It seems to me unnecessary to accept as authoritative what was said by Justice Strong, obiter, in *Dollar Savings Bank* vs. *United States*, 19 Wall., 227, 239, that is, that the United States has all the prerogatives of the British Crown, as *parens patriae*. A tax is an exaction imposed by the sovereign for its own purposes, which we should assume to be of an importance paramount to the rights of an individual. Besides it does not presuppose, like a debt, any voluntary acceptance of the hazard of the taxpayer's continued solvency. Perhaps it is easier to deduce the priority from such considerations than to establish it by prece-

dent. In any case the result does not appear to me to require us to accept as law the language cited, and I should think it quite possible that the implied prerogatives of a Republic against its citizens may not go so far. The prerogatives of the British Crown depend upon traditions and conceptions in some respects alien to those popular at the end of the eighteenth century and since. Whatever may be the final upshot, it seems to me unnecessary for the present to go further than the facts at bar, or to say more than the nature of a tax gives it, independently of statute, priority to debts due individuals, certainly to such as sound in contract, and these are all we have now to consider.